



U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005

November 13, 2020

VIA ECF

The Honorable Nicholas G. Garaufis
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *State of New York, et al. v. Trump, et al.*, No. 17-cv-5228 (NGG) (VMS)
Batalla Vidal, et al. v. Wolf, et al., No. 16-cv-4756 (NGG) (VMS)

Dear Judge Garaufis:

Defendants write to inform the Plaintiffs and the Court about what appears to be an inadvertent factual inaccuracy regarding the ratification of the Wolf Memorandum, made in their Reply in Support of their Motion for Summary Judgment (*Batalla Vidal* ECF No. 335).

As the basis for Defendants' ratification argument, *see* Defs.' Reply at 15-19, Defendants explained that, in the event that Chad F. Wolf had not been properly designated Acting Secretary of Homeland Security in the first instance, then under Plaintiffs' theory, "when Mr. Wolf was nominated by the President to serve as Secretary of Homeland Security on September 10, 2020," Federal Emergency Management Agency Administrator Peter Gaynor "became the President's designated Acting Secretary under the FVRA as the senior-most successor" under Executive Order 13753, *id.* at 15. Defendants further explained that on that same day, "[i]n that capacity and 'out of an abundance of caution,' Mr. Gaynor 'exercised 'any authority' he might have as Acting Secretary' under the FVRA and Executive Order 13753 and 'designated an order of succession for the office under [6 U.S.C. §] 113(g)(2)." *Id.* at 15; *see also, e.g., id.* at 18 ("Under Plaintiffs' theory, Mr. Gaynor became Acting Secretary under the FVRA and E.O. 13753. Invoking § 113(g)(2), Mr. Gaynor then set a new order of succession under the HSA.") (emphases omitted); *Batalla Vidal* ECF No. 324-1, Ex. 6.

Late yesterday evening (Thursday, November 12, 2020), however, the Department of Homeland Security (DHS) conveyed to the Department of Justice that it had learned that Mr. Gaynor's September 10, 2020 succession order may have been signed approximately one hour before Mr. Wolf's nomination was formally submitted to the Senate. Counsel for Defendants do not yet know the precise timing of events, and Department of Justice counsel are working expeditiously with DHS to verify the exact timing. But it now appears likely, based on the facts known to counsel for Defendants at this time, that Mr. Gaynor's succession order was signed on September 10, 2020, but *before* Mr. Wolf's nomination for the office of Secretary of Homeland Security was submitted to the Senate later that day, which (if true) would be inconsistent with counsel for Defendants' prior factual understanding, and with the most natural reading of some of the language in Defendants' reply brief. *See* Defs.' Reply at 1, 18.

Defendants also continue to evaluate the legal effect, if any, of this apparent sequence of events on their ratification argument, and intend to provide a further update no later than November 20, 2020. Under the circumstances, however, Defendants concluded it was necessary to notify the Court of this potential inaccuracy as quickly as possible.

Dated: November 13, 2020

Respectfully submitted,

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